

NUNC PRO TUNC

FILED

SEP 10, 2008

IN THE U.S. DISTRICT COURT

2008 SEP 12 AM 11:27

SOUTHERN DISTRICT OF CALIFORNIA

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OFFICE OF THE COURT CLERK

BY

PAN

DEPUTY

IN RE, ERIC W. BURTON #F02720,
ON FED.H.C., PETITIONER,
V. DIRECTOR OF THE C.D.C.A.,
RESPONDENT

CASE NO: 08-CV-0325 LAB (PA)

DATE: 9-4-08

TIME 0900

NOTICE OF CLARIFICATION, AND

NOTICE AND MOTION FOR LEAVE TO

AMEND PETITIONER'S "FIRST TIMELY"

FILED RULE 60(B) MOTION TO

ABATE THE DISMISSAL CONTRA

OF HIS FIRST TIMELY AND

PROPERLY FILED FED. H.C.

PETITION, FILED ON OR NEAR

2-08-08 IN THE U.S. DISTRICT

COURT, EASTERN CA. DISTRICT,

THE CORRECT JURISDICTION

OF WHERE PETITIONER IS INCARCER-

ATED, AND TRANSFERRED ON OR NEAR

2-19-08, TO THE U.S. DISTRICT

COURT, SOUTHERN DISTRICT OF CA.

"PROPERLY FILED" PURSUANT TO ARTUZ

V. BENNETT, 529 U.S. 1065 (2000);

GONZALEZ V. CROSBY (U.S. 2005) 545 US 524;

CIVIL RULE 15(Q) "LEAVE SHALL BE FREELY

GIVEN WHEN JUSTICE SO REQUIRES".

REQUEST COURT GIVEN NOTICE TO ALL PARTIES.

BASED ON MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT THEREOF.

1. NOTICE IS HEREBY GIVEN TO THE U.S. DISTRICT COURT, SOUTHERN CA. DISTRICT,
2. RESPONDENT, AND ALL PARTIES INVOLVED IN THE INSTANT MATTER.

3. STATEMENT OF FACTS

4. ON OR NEAR 8-25-08, PETITIONER, E.W. BURTON #FO2720, A PROSE,
5. UNCONSTITUTIONALLY INCARCERATED, INDIGENT STATE PRISONER, UNTRAINED
6. IN LAW OR IT'S PRACTICES, FILED A MOTION FOR LEAVE TO AMEND OR
7. WITHDRAW WITHOUT PREJUDICE, HIS TIMELY FILED "FIRST RULE 60(B)
8. MOTION FILED, AND TIMELY SERVED ON THE U.S. DISTRICT COURT, SOUTHERN
9. CA. DISTRICT ON OR NEAR 5-29-08, BY THE PETITIONER VIA THE NINTH
10. CIRCUIT CLERK, TO ABATE THE DISMISSAL CONTRA, OF PETITIONER'S
11. TIMELY, AND PROPERLY FILED "FIRST FED. H.C." PETITION, AS THE DISTRICT
12. COURT DISMISSED THE "APPLICATION" AS PROCEDURALLY BARRED, OF
13. WHICH REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER
14. THE U.S. DISTRICT COURT WAS CORRECT IN IT'S PROCEDURAL RULING.
15. IN LIGHT OF THE PETITION BEING "PROPERLY FILED" PURSUANT TO ARTUZ
16. V. BENNETT 529 U.S. 1065. (531 U.S. 4 (2000)), THAT AN APPLICATION FOR
17. STATE POST CONVICTION RELIEF CAN BE "PROPERLY FILED" EVEN IF THE
18. STATE COURTS DISMISS IT AS PROCEDURALLY BARRED. ON OR NEAR 8-25-
19. 08, PETITIONER FILED A NOTICE AND MOTION FOR LEAVE TO AMEND OR
20. WITHDRAW W/O PREJUDICE HIS "FIRST UNRULED" RULE 60(B) MOTION.
21. PETITIONER DOES "NOT" WISH TO WITHDRAW THE MOTION AS
22. "CLARIFICATION" - BUT RESPECTFULLY REQUEST LEAVE TO
23. AMEND THE MOTION PURSUANT TO CIVIL RULE 15(a), THIS MOTION IS
24. TIMELY, AND THE DISTRICT COURT HAS THE BROAD POWERS TO ALLOW
25. THE PETITIONER TO CURE THE DEFICIENCY, AS PROCEDURALLY
26. A RULE 60(B) MOTION TOLLS AEDPA, STATUTES OF LIMITATIONS TIMES
27. 1 YEAR, AS PETITIONER RECENTLY BECAME AWARE THAT THE FILING
28. OF A PETITION FOR HABEAS CORPUS IN FEDERAL COURT DOES NOT

BURTON, E.W. #F02720
P.O. BOX 5246 - CSATF/SP CI-19L
COR CORAN, CA, 93212
IN PROPER

1 TOLL THE STATUTE OF LIMITATIONS FOR FEDERAL HABEAS RELIEF,
2 28 U.S.C.A. § 2244(d), AND THE COURT HAD PREVIOUSLY DENIED
3 PETITIONER'S MOTION FOR A STAY AND ABEYANCE, PRIOR TO HIS
4 TIMELY AND PROPERLY FILED "FIRST AMENDED" PETITION, ALTHOUGH
5 THE CASE HAS BEEN REOPENED, PETITIONER WHO MAY OR MAY
6 NOT BE GRANTED RELIEF, WOULD STILL LIKE TO EXERCISE HIS
7 APPELLATE RIGHTS FOR THE CONTRARY DISMISSAL AND FAILURE OF
8 THE DISTRICT COURT TO REACH THE MERITS OF HIS "FIRST
9 PROPERLY, AND TIMELY FILED FED. H.C. PETITION FILED VIA PRISON LEGAL
10 MAIL ON OR NEAR 2-03-08 IN THE U.S. DISTRICT COURT, EASTERN DISTRICT
11 OF CA, THE CORRECT JURISDICTION WHERE PETITIONER IS INCARCERATED
12 AS REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER THE
13 FILING OF THE FIRST FED. H.C. PETITION IN THE DISTRICT WHERE
14 PETITIONER IS INCARCERATED WAS CORRECT UNDER 28 U.S.C. 2254
15 PROCEDURAL RULES, AND WHETHER THE U.S. DISTRICT COURT FOR THE
16 SOUTHERN CA. DISTRICT WAS CORRECT IN THEIR PROCEDURAL RULING
17 AND FAILURE TO REACHED THE MERITS OF PETITIONER'S "FIRST PROPERLY
18 AND TIMELY FILED FEDERAL HABEAS CORPUS PETITION FILED IN THE U.S.
19 DISTRICT COURT FOR THE SOUTHERN CA. DISTRICT ON OR NEAR 2-19-08,
20 VIA TRANSFER FOR THE U.S. DISTRICT, EASTERN CA. DISTRICT.
21 PURSUANT TO GONZALEZ V. CROSBY (U.S. 2005) 545 U.S. 524, 125 S.Ct. 2641,
22 WHICH HELD: A MOTION FOR RELIEF FROM JUDGMENT, CHALLENGING
23 ONLY DISTRICT COURT'S PRIOR RULING THAT HABEAS PETITION WAS
24 TIME-BARRIED, WAS NOT THE EQUIVALENT OF A "SECOND OR SUCCESSIVE
25 PETITION", AND REQUIRED FOR PETITIONER TO PREVAIL IN MOTION TO VACATE.
26 AS A TEXTUAL MATTER, THE PROVISION OF THE ANTITERRORISM AND
27 EFFECTIVE DEATH PENALTY ACT (AEDPA) GOVERNING SECOND OR SUCCESSIVE
28 HABEAS PETITIONS APPLIES ONLY WHERE THE COURT ACTS PURSUANT

BURTON, E. W. #F02720
P.O. BOX 5246 - CSATF/SPC 1-119L
COR CORAN, CA. 93212
IN PROPER

1 TO A PRISONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS,
2 28 U.S.C. A§ 2244(b)

3 ARGUMENT

4 SEE GONZALEZ V. CROSBY, 545 U.S. 524, 125 S. CT. 2641 (U.S. 2005) WE
5 HOLD THAT A RULE 60(b)(6) MOTION IN A § 2254 CASE IS NOT TO BE
6 TREATED AS A SUCCESSIVE HABEAS PETITION IF IT DOES NOT
7 ASSERT, OR RE ASSERT, CLAIMS OF ERROR IN THE MOVANTS STATE
8 CONVICTION. A MOTION THAT LIKE PETITIONER'S, CHALLENGES
9 ONLY THE DISTRICT COURT'S FAILURE TO REACH THE MERITS
10 DOES NOT WARRANT SUCH TREATMENT, AND CAN THEREFORE
11 BE RULED UPON BY THE DISTRICT COURT WITHOUT PRECERTIFICATION
12 BY THE COURT OF APPEALS PURSUANT TO § 2244(b)(3).

13 WHEREFORE PETITIONER RESPECTFULLY MOVES THIS COURT TO STAY HIS
14 "FIRST" RULE 60(B) MOTION FILED AND SERVED ON OR NEAR 5-29-08, WITH
15 LEAVE TO AMEND, AND THE "CLARIFICATION" NOT TO WITHDRAW THE
16 MOTION, IN THE FAIR ADMINISTRATION OF JUSTICE, TO CORRECT THE
17 ERRORS IN THE MOTION AS SO REFLECTED BY THE LIGHT OF THIS
18 PRESENT MOTION, PURSUANT TO CIVIL RULE 15(a), AND GONZALES V. CROSBY,
19 545 U.S. 524.

MEMORANDUM AND POINTS OF AUTHORITIES

1. GONZALEZ V. CROSBY, 545 U.S. 524, 125 S. CT. 2641 (U.S. 2005)
2. WE HOLD THAT A RULE 60(b)(6) MOTION IN A § 2254 CASE IS
3. NOT TO BE TREATED AS A SUCCESSIVE HABEAS PETITION
4. IF IT DOES NOT ASSERT, OR REASSERT, CLAIMS OF ERROR
5. IN THE MOVANT'S STATE CONVICTION. A MOTION THAT LIKE
6. PETITIONER'S, CHALLENGES ONLY THE DISTRICT COURT'S
7. FAILURE TO REACH THE MERITS DOES NOT WARRANT
8. SUCH TREATMENT, AND CAN THEREFORE BE RULED UPON
9. BY THE DISTRICT COURT WITHOUT PRECERTIFICATION
10. BY THE COURT OF APPEALS PURSUANT TO § 2244(b)(3).
11. SEE RHINES V. WEBER, ANTE 544 U.S. AT 276, 125 S. CT. 1528, 1531, 161 L. ED.
12. 2d. 440 (2005), A PETITIONER'S REASONABLE CONFUSION ABOUT
13. WHETHER A STATE FILING WOULD BE TIMELY WILL ORDINARILY
14. CONSTITUTE "GOOD CAUSE FOR HIS FAILURE [125 S. CT. 1814] TO EXHAUST
15. HIS UNEXHAUSTED CLAIMS ARE POTENTIALLY MERITORIOUS,
16. AND THERE IS NO INDICATION THAT THE PETITIONER ENGAGED
17. IN INTENTIONALLY [544 U.S. 417] DILATORY TACTICS," THEN THE
18. DISTRICT COURT LIKELY "SHOULD STAY, RATHER THAN DISMISS,
19. THE MIXED PETITION".
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JONES V. BOCK, 549 U.S. 199, 127 S.Ct. 910 (U.S. 2007) (Quoting; BUT

A COURT PRESENTED WITH A MIXED HABEAS PETITION
TYPICALLY "ALLOW[S] THE PETITIONER TO DELETE THE
UNEXHAUSTED CLAIMS AND TO PROCEED WITH THE
EXHAUSTED CLAIMS," RHINES V. WEBER, 544 U.S. 269, 278,
125 S.Ct. 1528, 161 L.Ed. 2d 440.

FEDERAL RULE OF CIVIL PROCEDURE 8(a) REQUIRES SIMPLY
A "SHORT AND PLAIN STATEMENT OF THE CLAIM" IN A COMPLAINT,
AND PLRA CLAIMS ARE TYPICALLY BROUGHT UNDER 42 U.S.C.
§ 1983, WHICH DOES NOT REQUIRE EXHAUSTION AT ALL.
THE FACT THAT THE PLRA DEALT EXTENSIVELY WITH
EXHAUSTION, BUT IS SILENT ON THE ISSUE WHETHER
EXHAUSTION MUST BE PLEADED OR IS AN AFFIRMATIVE
DEFENSE, IS STRONG EVIDENCE THAT THE USUAL
PRACTICE SHOULD BE FOLLOWED, AND THE PRACTICE
UNDER THE FEDERAL RULES IS TO REGARD EXHAUSTION
AS AN AFFIRMATIVE DEFENSE, INCLUDING IN THE
SIMILAR STATUTORY SCHEME GOVERNING HABEAS
CORPUS, DAY V. MCDONOUGH, 547 U.S. 198, 126 S.Ct. 1675,
164 L.Ed. 2d 376.

OTHER CIRCUITS REJECT TOTAL EXHAUSTION ALTOGETHER,
INSTEAD DISMISSING ONLY UNEXHAUSTED CLAIMS
AND CONSIDERING THE REST ON THE MERITS. SEE, E.G.
ORTIZ V. MC BRIDE, 380 F.3d 649, 663 C.A. 22004),
ONLY INDIVIDUAL CLAIMS, AND NOT THE APPLICATION CONTAINING
THOSE CLAIMS, CAN BE PROCEDURALLY DEFAULTED UNDER STATE LAW
PURSUANT TO OUR HOLDINGS IN COLEMAN V. THOMPSON, 501 U.S. 722, 111 S.Ct.
2546, 115 L.Ed. 2d 640 (1991), AND WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 594 (1977).

GIDEON V. WAINWRIGHT SUPRA (1963)

07-159 NEWPORT NEWS, VA. V. SCIO LINO

EMPLOYEES - DISCHARGE - STIGMATIZING INFORMATION IN PERSONNEL FILE - NAME -
CLEARING HEARING.

RULING BELOW (4TH CIR. F.3d 642, 75 U.S.L.W. 1557, 25 I.E.R. CAS. 1402):

IN FORMER CITY EMPLOYEE'S 42 U.S.C. § 1983 ACTION ALLEGING THAT
WHEN DISCHARGING HIM, CITY PLACED IN HIS PERSONNEL FILE FALSE
INFORMATION DAMAGING TO HIS GOOD NAME WITHOUT GRANTING
HIM NAME-CLEARING HEARING. DISTRICT COURT ABUSED IT'S
DISCRETION WHEN, AFTER DISMISSING COMPLAINT BECAUSE
FORMER EMPLOYEE FAILED TO ALLEGE FACTS ASSERTING
LIKELIHOOD THAT PROSPECTIVE EMPLOYERS OR MEMBERS OF
PUBLIC WOULD SEE FILE'S DAMAGING INFORMATION, IT DENIED
FORMER CITY EMPLOYEE'S MOTION TO AMEND HIS COMPLAINT
IN ORDER TO MEET THAT STANDARD.

QUESTION PRESENTED: WHEN GOVERNMENT EMPLOYER TAKES NO STEPS TO
PUBLICIZE REASONS FOR EMPLOYEE'S TERMINATION, BUT PLACES ALLEGEDLY
FALSE STIGMATIZING REASONS FOR TERMINATION IN EMPLOYEE'S PERSONNEL
FILE, DOES DUE PROCESS CLAUSE REQUIRE EMPLOYER TO PROVIDE
TERMINATED EMPLOYEE WITH NAME-CLEARING HEARING? PET. FOR CERT.
FILED 8/8/07.

SEE ALSO HUDSON V. HARDY, 412 F.2d 1091, 1095 (D.C. CIR. 1968) - JUDGE HAS POWER
UNDER RULE 56(f) TO "MAKE SUCH OTHER ORDER AS MAY BE JUST." IT COULD
ALSO INCLUDE AN ORDER THAT PRISON OFFICIALS BRING THE PETITIONER TO
COURT TO LET HIM TESTIFY ON HIS OWN BEHALF. SEE CRUZ V. BETO, 405
U.S. 319, 322 (1972) - A COMPLAINT "SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A
CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT THE PLAINTIFF CAN PROVE NO SET OF
FACTS IN SUPPORT OF HIS CLAIM WHICH WOULD ENTITLE HIM TO RELIEF."

1. SEE BROWN V. MOORE, 532 U.S. 968, 121 S.Ct. 1598, 149 L.Ed.2d 464 (2001) -
2. GRANTING A PRO SE PETITION FOR CERTIORARI, VACATING THE ELEVENTH
3. CIRCUIT'S JUDGMENT DENYING A COA AND REMANDING FOR RECONSIDERATION
4. IN LIGHT OF ARTUZ V. BENNETT, 529 U.S. 1065, 120 S.Ct. 1669, 146 L.Ed.2d 479.
5. (2000); SEE COA STANDARDS SET FORTH IN MILLER-EL V. COCKRELL, 537 U.S. 322,
6. 71 U.S.L.W. 4095 (2003)

IN PROPER
ARGUMENT—

1 A COURT MAY ALSO ADDRESS A PROCEDURALLY DEFAULTED
2 CLAIM IF FAILURE TO DO SO WOULD RESULT IN THE
3 CONVICTION OF ONE WHO IS ACTUALLY INNOCENT—LAGRAND V.
4 STEWARD (9TH CIR. 1998) 133 F.3d 1253; SCHLUP V. DELO (1995) 513
5 U.S. 298, 115 S. CT. 851, 130 L. Ed. 2d 808.

6 THERE ARE NO INTERVENING U.S. SUPREME COURT DECISIONS
7 ON POINT OR OTHER INDICATIONS THAT THE STATE COURT
8 WILL CHANGE ITS OPINION.—SWEET V. OJPP (9TH CIR. 1981)
9 640 F.2d 233, 236; SEE ALSO GARDNER V. PITCHES (9TH CIR. 1984)
10 731 F.2d 637, 640.

11 STATE REMEDIES EXHAUSTED, NO NEED TO REFILE IN STATE COURT
12 AFTER REVIEW DENIED, BROWN V. ALLEN (1953) 344 U.S. 443, 73 S. CT.
13 397, 97 L. Ed 469.

14 APPOINTMENT OF COUNSEL IN COMPLEX CASE—SEE 18 U.S.C. § 3008 (E)
15 DILLON V. U.S. (9TH CIR. 1962) 307 F.2d 445, F.R.H.C. RULE 8(C), 28 USC § 1915(e)(1) 2254 (H);
16 BASHOR V. KISLEY (9TH CIR. 1984) 730 F.2d 1228, F.R.H.C. 6(A), ESKRIDGE V. RHAY (9TH CIR. 1985) 345 F.2d 718.

17 EVIDENTIARY HEARING TO SETTLE FACTUAL DISPUTES, TAYLOR
18 V. CARDWELL (9TH CIR. 1978) 579 F.2d 1380

19 PRAYER:

20 WHEREFORE PETITIONER PRAYS FOR THIS HONORABLE U.S. DISTRICT COURT
21 TO GRANT THIS MOTION, FOR A STAY IN HIS FIRST RULE 60(B) MOTION
22 TIMELY FILED ON OR NEAR 5-29-08. AS AEDPA CREATES CONFUSION
23 AND COMPLICATIONS FOR THE UNTRAINED, LAYMAN, PRO SE STATE PRISONER,
24 WITH IT'S LIMITATIONS. PETITIONER HAS RECENTLY BECAME AWARE
25 THAT A PROPERLY FILED RULE 60(B) MOTION SUCH AS HIS, TOLLS
26 AEDPA IN IT'S OWN STATUTES OF 1 YEAR, AND THEREBY ALLOWING
27 AN OTHERWISE DISADVANTAGED PRO SE CITIZAN AN OPPORTUNITY
28 TO PURSUE HIS LEGAL REMEDIES FROM AN INCORRECT RULING
29 OF THE DISTRICT COURT, AND APPEAL IT'S DECISION. THIS MOTION
30 SHOULD BE GRANTED, AND COUNSEL APPOINTED IN THE INTEREST OF JUSTICE.
31 I DECLARE THE AFOREMENTIONED IS TRUE AND CORRECT UNDER THE PENALTIES
32 OF PERJURY, UNDER U.S. LAW.

SIGNED: Eric W. Burton #F02720
ERIC W. BURTON

DATED: 9-4-08

Page ~~6~~ 101 EUB.

CERTIFICATE OF SERVICE

Case Name: IN RE BURTON ON FEH.C. PETITIONER V. DIRECTOR OF THE C.D.C.A. RESPONDENT

Case No.: 08-CV-0325 LAB(PR)

IMPORTANT: You must send a copy of ALL documents filed with the court and any attachments to counsel for ALL parties in this case. You must also file a certificate of service with this court telling us that you have done so. You may use this certificate of service as a master copy, fill in the title of the document you are filing and attach it at the back of each filing with the court. Please list below the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below. You must attach a copy of the certificate of service to each of the copies and the copy you file with the court.

I certify that a copy of the NOTICE OF CLARIFICATION AND LEAVE TO FREELY AMEND 1ST TIMELY FILED RULE 60(b) MOTION TO ABATE DISMISSAL CONTRA... (4 PAGES) (Name of document you are filing, FILED ON OR NEAR 05-29-08. i.e., opening brief, motion, etc.)
PURSUANT TO ARTUZ V. BENNETT 524 US 146 - BASED ON MEMORANDUM OF POINTS AND AUTHORITIES (SEPARATE DOCUMENT) IN SUPPORT THEREOF (5 PAGES),
and any attachments was served, either in person or by mail, on the persons listed below. REQUEST COURT GIVE NOTICE TO ALL PARTIES OF INSTANT ACTION

E. W. Burton # F02720
Signature
Notary NOT required

Name
KELLEY A. JOHNSON - ATTORNEY GENERAL
DIRECTOR, C.D.C.A. -

Address
KELLEY.A.JOHNSON@DOJ.CA.GOV.

Date Served
9-04-08